SUPREME COURT, U. S.

IN THE

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Supreme Court of the United States

October Term, 1967
No. 630

UNITED STATES OF AMERICA and STEWART L. UDALL
SECRETARY OF THE INTERIOR,

Petitioners,

vs.

ALFRED E. COLEMAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS.

Respondents accept Petitioners' brief on the subjects, "Opinion Below" and "Jurisdiction".

Questions Presented.

The questions presented for review have been restated.

1. Whether the Secretary of the Interior erred in ruling that to establish valid placer mining claims located in the years 1949 through 1952 for building stone under the building stone act (30 U.S.C. 161) and the mining laws, Coleman must show that the building stone from these claims could have been marketed at a profit before July 23, 1955.

2. Whether the Secretary of Interior exceeded his statutory authority in basing his decision in the administrative appeal on issues of which Coleman had no notice nor opportunity to present evidence before the Hearing Examiner.

3. Whether the Secretary of the Interior erred in ruling that building stone on the Coleman placer mining claims is a "common variety" of stone within the meaning of 30 U.S.C. 611.

Statutes Involved.

30 U.S.C. 22 (Section 1 of the Act of May 10, 1872, 17 Stat. 91, as amended), provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. 161 (Section 1 of the Act of August 4, 1892, 27 Stat. 348), provides in pertinent part:

> Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims. * * *

Section 3 of the Act of July 23, 1955, 69 Stat. 368, provides:

> A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, However,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

Section 1 of the Act of July 23, 1955, 69 Stat. 367, provides in pertinent part:

> The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) and vegetative materials (including but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products) on public lands of the United States, including, for the purposes of this Act, land described in the Acts of August 28, 1937 (50 Stat. 874), and of June 24, 1954 (68 Stat. 270), if the disposal of such mineral or vegetative ma-

terials (1) is not otherwise expressly authorized by law, including, but not limited to, the Act of June 28, 1934 (48 Stat. 1269), as amended, and the United States mining laws, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary:

* * * As used in this Act, the word "Secretary" means the Secretary of the Interior except that it means the Secretary of Agriculture where the lands involved are administered by him for national forest purposes * * *.

5 U.S.C. 554 (formerly 5 U.S.C. 1004) provides in pertinent part:

* * * (b) Persons entitled to notice of an agency hearing shall be timely informed of—

* * * (3) the matters of fact and law asserted.

5 U.S.C. 703 (formerly 5 U.S.C. 1009(b)) Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. 706 (formerly 5 U.S.C. 1009(e)) Scope of review:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the Court shall review the whole record or those parts

of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 1 of the Act of July 31, 1947, 61 Stat. 681 provides:

> The Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products, on public lands of the United States if the disposal of such materials (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary: *Provided, however,* That, to the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any person, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this Act, for use other than for commercial or industrial purposes or resale. Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local govern-

mental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency or of such State, Territory, or local governmental unit. Nothing in this Act shall be construed to apply to lands in any national forest, national park, or national monument or to any Indian lands, or lands set aside or held for the use or benefit of Indians, including lands over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians.

Statement.

Alfred Coleman and his wife located placer mining claims on land "chiefly valuable for building stone" under 30 U.S.C. 161 of the mining law.

Upon Coleman's application for a mineral patent a Contest was filed at the request of the Forest Service. A deputy solictor on behalf of the Secretary of Interior ruled on appeal, that the mining claims were invalid and Coleman's application for mineral patent was denied. This decision will hereafter be called the Secretary's decision although it is actually a decision of a deputy solicitor in the Interior Department. Thereafter, the United States Government filed an action in ejectment in the United States District Court and by answer and counter-claim, the legality of the decision of the Secretary of Interior was put in issue. The United States District Court granted Summary Judgment against Coleman, which decision was reversed by

the Court of Appeals for the Ninth Circuit. This Court then granted certiorari.[1]

(a) Contest No. 6833.

Respondent Coleman and his wife, now deceased, in the years 1949 through 1952 located eighteen placer mining claims for building stone pursuant to 30 U.S.C. 161.[2] In January, 1956, they applied for mineral patent for these mining claims. At the request of the Regional Forester, Contest No. 6833 was commenced on March 5, 1958, against them. The contest complaint charged that the Colemans' eighteen placer mining claims were invalid because:

(a) The lands embraced within the claims are non-mineral in character.

(b) Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

(c) $500.00 has not been expended on Baldwin Lake Quarry Claims Nos. 7, 9, 11 to 19, inclusive.

On September 16, 1958, a hearing was held before a Hearing Examiner. Mr. and Mrs. Coleman, who were not represented by legal counsel throughout the contest proceedings and administrative appeals, obviously were misled by charges (a) and (b) set forth above, particularly when the first witness for the

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[1] 5 U.S.C. 703 provides in part:

"* * * Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

[2] The total acreage for the eighteen claims was 720 acres. 30 U.S.C. 36 permits two persons to locate a maximum of 40 acres as a placer mining claim. Mr. and Mrs. Coleman jointly located all eighteen claims.

United States, a mining engineer, testified that the quartzite which completely covered the Colemans' placer mining claims and a much larger adjacent area [A. 116, 117] had for many, many years been used locally and, to some extent—somewhat distant from the area—for fireplaces, rock walls, and to a limited extent, for veneer-type construction [A. 106]. Although the Secretary's decision, which was the last of the decisions in the administrative appeal of this Contest, stated that the *only issue in dispute* at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955 [A. 12], this was clearly not regarded as an issue by those present at the hearing, nor is it suggested by the Contest Complaint and Answer.

July 23, 1955, of course, is the effective date of Public Law 167 (30 U.S.C. 601, *et seq.*, particularly 30 U.S.C. 611). The only reference to this law at the hearing was the observation of the Hearing Officer that the *Contest was not under Public Law 167* [A. 139]. At the September 16, 1958 hearing, the United States introduced no evidence directed to this July 23, 1955 cutoff date. Indeed, much of the evidence of the United States related to sales subsequent to that date [A. 107]. Finally, the Hearing Examiner did not regard Public Law 167 or the July 23, 1955 date of any significance, since neither was mentioned in his decision of December 18, 1958, finding five of the eighteen claims valid [A. 177].

Despite the confusion as to the issues in the contest hearing and the fact the Colemans were not represented by counsel, the hearing did develop these facts:

During the years 1949 through 1952, Mr. and Mrs. Coleman located eighteen placer mining claims in the

San Bernardino Mountains, San Bernardino County, California [listed at A. 23]. From the time they located their first placer claim until the contest hearing, they carried on the business of quarrying and selling stone. Mr. Coleman described this business operation as follows [A. 132-138]:

> "I saw a long-term operation there if someone were to put enough in to justify a large machinery investment, and eventually market the product.
>
> "But as a short-term operation, just going in and digging a 20-acre claim, it would soon be depleted and wouldn't mean anything, and you couldn't justify it. So I went in on a long-range basis.
>
> "The first thing that was needed was lots of room, because the type of terrain is so steep that in order to get to the top and bench it off in a proper manner you have to have room for long, easy grades to gain the altitude, which Mr. Sanborn described around 1100 feet, and it is all of that and (Tr. 64) more. So it was based on good, practical common sense." [A. 132].
>
> * * *
>
> "So, in order to work it safely and to have access to all of it and not have waste, you have to start at the top. The first thing that was necessary was access, and that meant roads. Tunnels or shafts were useless.
>
> "Those roads had to be built either by expenditures of considerable capital or a long-term labor. I didn't have the capital.

"I provided the labor myself; that labor has a value, considerable value, regardless of what it might have cost if a big company had come in. They would have had to have taken risks and paid for them that I had to simply take a blasting risk, for instance." [A. 133].

* * *

"The Witness: Well, I can say this: I have my current (Tr. 72) order book here, and the current price, the base price of the rock that I have fixed at the quarry, $15.00 a ton for quarry run, broken rock, what Mr. Burman called Big Bear rubble [A. 137].

"From that can be built ornamental walls, a large portion of fireplaces, in fact, a whole fireplace if they are not too critical about its beauty, or like it rough, and many other things of that nature.

"As soon as they go into more critical rock, where they want sized material, they have a limited space to build in, then I quote only by the square foot, because I first have to find out what they are going to build and how much labor is involved. Some rock is easier to sort out and split out than others. If they want something that is hard to get, I have to figure the man hours and the time to produce that rock from the source that I have. If you have no source, you can't figure. I have got a wide variety of deposits there, as shown by these photographs. I saw them, and I saw by having them I could go to this one or that one and get something for this purpose or that or the other. That was the purpose in filing on them.

There are several classifications of quartzite up there. They all have a use and all have a value, and the lowest price for anything that is taken out in the way of building rock is around $15.00 a ton. Sometimes if it is very rough and easy to get, we quote lower, and from there we go up to so much per square foot, depending on how valuable (Tr. 73) the labor may be, what the customer agrees upon. So that's the basis of the values for the ornamental rock.

"It is not like Arizona flagstone that it comes out in a uniform slab. You do some classifying and sorting and splitting to produce it. There has never been too good a sale, not because the rock is not good, but simply because I haven't advertised one single word any place for years. I first wanted to get the thing open to a point where I could deliver in large quantity, and we have about reached that point now. There is no lack of market. The lack is of selling effort." [A. 137-138].

Respondent Coleman brought to the hearing twenty-two sales books setting forth past sales [A. 162]. These sales books were not offered in evidence nor is there evidence of the aggregate amount of sales included in these sales books, although one witness for the Government concluded that in excess of $12,000 worth of stone had been disposed of [A. 107]. Coleman estimated that 80% of the stone had been sold for its ornamental qualities [A. 171]. A witness for the United States, who was in the building stone business, testified that the stone on the claims was a good building stone suitable for mass construction techniques [A. 128]. Photographs in the pocket of the Appendix il-

lustrate the use of this stone. In addition to making these sales during the period from 1949 to the hearing in 1958, Coleman improved the mining claims by developing working areas and roads, particularly on those mining claims where most of the stone was quarried, and further constructed on one mining claim a structure which was a combined living quarters and a large shop area for maintaining machinery [A. 131].

Respondent Coleman testified that when he and Mrs. Coleman located their eighteen placer mining claims, the Forest Service appeared glad to see "someone legitimately go into the quarry business in the area." [A. 140].[3]

Coleman's good faith in conducting a mining operation on these placer mining claims was never questioned, and both the Hearing Examiner and Director of the Bureau of Land Management expressly found good faith [A. 190 and 257]. And the evidence at the hearing affirmatively shows that he worked hard from 1949 to 1958 to make his quarrying operation a success.[4]

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[3]Affidavit of Alfred Coleman in Opposition Motion for Summary Judgment states: [A. 29] "Prior to my filing of any claims, I consulted with the local Forest Ranger at Big Bear Lake, Leo P. Slattery, who exhibited to me a Directive from the Regional Forester to the effect that as of January 1950 the Regional Forester was not to sell stone or rock from the National Forest for commercial enterprises as the Department of Forestry had no means of policing quarries or properly handling such business in competition to private enterprise." For further instances of cooperation between Alfred Coleman and the Forest Service [see A. 33-37].

[4]Counsel for the United States concedes that Respondent Coleman "is a man of great sincerity who firmly believes in the merits of his claims." [A. 270].

Finally, no evidence was introduced by the Government that the land covered by the Coleman mining claims had any value except for building stone, and the Director of Bureau of Land Management stated "* * * it must be conceded that the lands are 'chiefly valuable' for their building stone." [A. 254]. Indeed, counsel for the United States suggested at the hearing that the Forest Service may wish to sell the building stone pursuant to Public Law 167 [A. 139].

On December 18, 1958, the Hearing Examiner found five of the mining claims to be valid, and the other thirteen invalid [A. 190]. On appeal, on June 22, 1960, the Acting Director of the Bureau of Land Management sustained the validity of three of the mining claims and a part of the fourth [A. 253-261].

The Secretary, acting through his Deputy Solicitor, concluded that all of the Coleman building stone claims were null and void because they lacked discovery [A. 7-13]. The Secretary stated:

> "The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. * * * He [Coleman] was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23, 1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit." (Word in brackets added.) [A. 12].

(b) Ejectment Action.

On August 8, 1963, the United States brought its ejectment action in the United States District Court against Alfred Coleman[5] and Edward J. McClellan[6] alleging that Coleman and McClellan occupied mining claims which had been declared null and void by decision dated March 27, 1962, of the Secretary in Contest No. 6833.

Both by an answer and by a counterclaim seeking an order requiring the Secretary to issue a mineral patent, Coleman alleged that the Secretary's decision of March 27, 1962, was not final and should be judicially reviewed as provided by the Administrative Procedure Act.

On May 12, 1965, the District Court granted judgment in favor of the United States against Coleman and McClellan upon a motion for summary judgment. Exhibit 2 attached to the Government's motion for summary judgment was a communication from D. M. Tucker, Recreational and Lands Staff Officer, to the Regional Forester which stated in reference to the use that could be made of the land embraced within the boundaries of the Coleman claims that there was no commercial timber and wildlife dependent upon the area, however, in regard to minerals the area was a source for building stone.[7]

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[5]Alfred Coleman and his wife were the Contestees in Contest No. 6833, but Mrs. Coleman died while the appeal was pending before the Director of the Bureau of Land Management.

[6]Edward J. McClellan on May 17, 1958, leased from Alfred Coleman approximately five acres on one of the placer building stone claims. This lease authorized McClellan to remove quartzite products other than building stone [A. 145].

[7]Although this communication is in the file of this Court, it

(This footnote is continued on the next page)

The defendants in the District Court appealed and on June 21, 1966, the Court of Appeals for the Ninth Circuit remanded the case to the District Court with instructions to enter judgment denying the prayer of the United States for ejectment and, on the counterclaim, reversing the final decision of the Secretary of the Interior in Contest No. 6833 and remanding the case to the Department of the Interior for further proceedings and decision in accordance with the principles enunciated by the court [A. 47-68].

The United States petitioned for rehearing [A. 69]. The Secretary was made a party on February 8, 1967, upon invitation of the court of appeals. After additional briefs and oral argument, the court of appeals [A. 76] on June 20, 1967 reaffirmed its June 21, 1966, opinion and decision [A. 77].

The United States and the Secretary then petitioned for and were granted certiorari by this Court.

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was not included in the Appendix. For this reason the pertinent part is quoted as follows:

"2. What use do we intend to make of the lands?

A. Timber—No commercial timber on the claims. Pinon and juniper serve aesthetic and soil erosion purposes.

B. Forage—No forage present.

C. Watershed—No extraordinary problems involved due to rock and shale being present.

D. Wildlife—No wildlife dependent on the area, but the spring involved should be used for the development of water fowl habitat in connection with Baldwin Lake.

E. Minerals—Is a source for local building stone. No use of any consequence of this stone other than in the Big Bear area with a few loads going out of the Valley.

"3. What are the claims suitable for?

They are suitable for scenic views, forest and mountain aesthetics and for supplying building stone for local uses."

Summary of Argument.

1. The Argument in Support of Point I. Is Summarized as Follows:

The contest proceedings were initiated by the filing of a complaint which charged "(a) The lands embraced within the claims are nonmineral in character. (b) minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. * * *" [A. 80].

The Secretary's decision was bottomed upon his finding that Coleman "was required to show that by reason of all the pertinent factors, including the existence of a present demand before July 23, 1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit. * * * I am unable to find evidence which supports such conclusions as to any of the claims." [A. 12 and 13].

We contend that the Secretary's decision is based on issues of which Coleman had no notice or opportunity to meet at the hearing and which were not considered as issues at the hearing, but became critical only on appeal. For the Court of Appeals to have reinstated the Secretary's decision under these circumstances would have been plain error and contrary to the procedural standards which this Court has enunciated in past decisions.

2. The Argument in Support of Point II. Is Summarized as Follows:

The Secretary erroneously classified the building stone on the Coleman claims as a common variety. This error was made first because of an incorrect interpretation of the words, "common varieties of

* * * stone", as used in Section 3 of the Act of July 23, 1955. These words are construed by Interior not to mean common varieties of stone but common varieties of a particular type of stone, such as limestone or building stone. Further, the Secretary incorrectly held that an abundance of stone in an area made the stone a common variety. For several reasons these interpretations are incorrect. First, they are in conflict with a literal reading of the law. Second, the interpretations are inconsistent with Section 3 of the Act of July 23, 1955 (particularly the interpretation that would make "common varieties of * * * stone" mean common varieties of building stone), when read in light of the other provisions of the Act and the law which it amended—Materials Disposal Act of July 31, 1947. Moreover the legislative history of the Act of July 23, 1955 when considered in its entirety supports the view that "common varieties of * * * stone" was not intended to mean "common varieties" of building stone and Congress did not intend by implication to repeal wholly or in part 30 U.S.C. 161.

Even under Interior's interpretations, the evidence in this case discloses that because of the range of colors and other characteristics of the Coleman building stone, it was valuable because of "some property giving it distinct and special value" within the meaning of Section 3 of the Act of July 23, 1955. For this further reason, the Secretary erred in classifying it as a "common variety".

3. The Argument in Support of Point III. Is Summarized as Follows:

By inferring that this is a collateral attack on the Secretary's decision and that the Court's jurisdiction in the case was confined within, "the relatively narrow precincts afforded by an action in the nature of mandamus", the Government seeks to restrict the scope of judicial review and to avoid the standards of review set forth in the Administrative Procedure Act, 5 U.S.C. 706.

This was contrary to the provisions of the Administrative Procedure Act and was even contrary to settled law prior to that Act. When the Secretary voluntarily became a party to this action, he was a party for all purposes and could not qualify his appearance so as to restrict the scope of judicial review. The Government's reliance on 28 U.S.C. 1361 is misplaced. Finally, the Court had jurisdiction of the ejectment action brought by the Government by virtue of 28 U.S.C. 1345 and Coleman had the right, as a part of his defense, to have the Secretary's decision reviewed without the Secretary being made a party.

4. The Argument in Support of Point IV. Is Summarized as Follows:

Inasmuch as Coleman's placer mining claims were located pursuant to 30 U.S.C. 161 the applicable test of discovery is whether the lands are chiefly valuable for building stone. The Government did not dispute Coleman's assertion and evidence that the lands are chiefly valuable for building stone and that Coleman

had conducted a quarrying operation on the lands from 1949. Therefore the Secretary's decision is erroneous.

The Government's contentions with respect to the present marketability at a profit test are erroneous. It has not been a test to which the Government has adhered to for fifty years as the Government contends. Contrary to the assertions of the Government, the 1929 and 1933 Interior decisions do not establish such a rule. Further, this rule of discovery, when later announced by the Government, was limited to substances of common occurrence, such as sand and gravel, and was a requirement for these minerals in addition to the prudent man test. In 1962, Interior for the first time stated the marketability test was one aspect of the prudent man test and applicable to all minerals. Now the Government contends in its brief for the first time that present marketability at a profit is simply a refinement of the prudent man test and that the two tests are essentially the same. Moreover, the Government errs when it contends in its brief that mining claims are invalid and there is no discovery where the mineral deposit can not be marketed at a profit under existing conditions but which represents substantial reserves dependent upon reasonably contemplated changes in mining methods, processing techniques and market conditions.

The evidence at the Contest hearing actually proved discovery by Coleman under the prudent man test and even under the Interior created present marketability

at a profit test. Moreover, this conclusion is bolstered as to part of the placer mining claims by the decisions of the Hearing Examiner and the Director of the Bureau of Land Management.

A finding of no discovery caused the Government to take the inconsistent position that although the lands on which Coleman located his building stone claims are chiefly valuable for building stone, the building stone deposits thereon are not valuable. The Government is also inconsistent in declaring the Coleman placer claims invalid at a time when counsel for the Forest Service acknowledges that if the claims are held invalid, the Forest Service may wish to dispose of building stone on the claims under the Materials Disposal Act.

ARGUMENT.

I.

The Secretary of Interior Exceeded His Statutory Authority in Basing His Decision in the Administrative Appeal on Issues of Which Coleman Had No Notice and No Opportunity to Present Evidence Before the Hearing Examiner.

The Secretary found [A. 6-13] that (a) the building stone on the Coleman claims was a common variety of stone within the meaning of Section 3 of the Act of July 23, 1955, and (b) the claims were invalid because there was not on July 23, 1955, a market for profitable sales of the building stone located on these claims. The reasons these conclusions are incorrect will be set forth elsewhere in the brief.

We are concerned here only with the failure to give Coleman notice before and during the contest proceedings of the new issues on which the Secretary based his decision. The contest complaint certainly did not inform them of these new issues. On the contrary, it charges that minerals had not been found within the limits of the Coleman claims in sufficient quantities to constitute a valid discovery and that the lands are nonmineral in character [A. 80]. In fact, the Secretary found that the abundance of building stone on these claims and in the area outside these claims made the building stone on the claims a common variety of mineral and not subject to location after July 23, 1955 [A. 12].

During the contest hearing, no mention was made of the common varieties issue or the cutoff date of July 23, 1955. The only mention of Public Law 167

(Act of July 23, 1955) was when the Hearing Examiner stated the contest was not under that law [A. 139]. Finally, the Hearing Examiner did not mention common varieties, July 23, 1955, or Public Law 167, in his decision. These new matters became crucial only on appeal.

The Court of Appeals, in its decision in another connection, pointed out that the Coleman's "lack of awareness of the issues upon which the case was ultimately determined by the Secretary is evident." [A. 66]. That the Colemans were not represented by counsel throughout these administrative hearings only adds to the injustice of allowing the Secretary's decision to stand in the light of failure to give the Colemans adequate notice of these new issues.

On the facts of this record it would have been plain error and contrary to the procedural standards which this Court has enunciated in past decisions for the Court of Appeals to have reinstated the Secretary's decision as a final determination of the rights in issue. The essence of an adjudication that satisfies due process is a reasonable opportunity to learn and rebut the arguments and contentions of one's adversary, the presentation of evidence and argument by both sides of a controversy, and a decision of that controversy that is based solely on the issues, argument and evidence presented. As stated in *Morgan v. United States,* 304 U.S. 1, 18-19 (1938):

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may

> be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Accord, Gonzales v. United States, 348 U.S. 407, 414 (1955)

The Administrative Procedure Act, an act framed to guard against excesses of administrative zeal and thought by its draftsmen to impose procedural standards of fairness that exceeded the Constitutional minimums, see *United States v. Morton Salt Co.,* 338 U.S. 632, 644 (1950), also required notice and an opportunity to be heard. (5 U.S.C. 554 (b) (3)) The Department of the Interior has, of course, recognized the applicability of the standards and philosophy of the Administrative Procedure Act to contest proceedings to invalidate a mining claim. The landmark decision is the opinion of Secretary Seaton in *United States v. O'Leary,* 63 I.D. 341 (1956).

We submit that the Court of Appeals quite rightly held that the administrative proceeding must be remanded to the Secretary. The Court below rested that conclusion upon legal errors of substance which it thought decisive to the administrative result. The judgment upon appeal should be affirmed, putting those grounds aside for the present, upon the ground that, whatever may be the substantive law to be applied,

the United States may not invalidate a mining claim without affording the claimant fair notice of the grounds asserted in time to give an adequate opportunity to meet them.[8] The administrative proceedings here notably failed to meet that standard.

II.

The Secretary Erred in Construing the Words "Common Varieties * * * of Stone" in Section 3 of the Act of July 23, 1955 and Further in Holding the Coleman Building Stone to Be a Common Variety of Minerals.

The Act of July 23, 1955 by its terms is applicable only to mining claims "hereafter located". All of the Coleman placer claims were located prior to its enactment and Coleman operated a quarry on these claims continuously since 1949. Under these circumstances this Act had no application to the Coleman claims.

Nothing in the contest complaint, answer, or hearing proceedings even remotely suggests that anyone thought that this statute was in any way applicable. The only mention of this 1955 law during the hearing occurred when the Government counsel suggested that the Forest Service might wish to sell the building stone under the Materials

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[8]Where the reason given below for a decision is wrong, "if the decision below is correct, it must be affirmed . . ." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). "The issue on appeal is the correctness in ultimate effect of a judgment and not the reason or reasons given for it by the trial court." *Texaco, Inc., v. Holsinger*, 336 F. 2d 230, 233 (10th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965). See also *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Disposal Act which had been amended by the 1955 law, and, in the ensuing discussion, Coleman was admonished this was not a hearing under the 1955 law [A. 138]. The Hearing Examiner then handed down his decision finding five of the Coleman claims valid without mentioning the 1955 law, common varieties, or the July 23, 1955 cutoff date on which the Secretary based his decision. In the light of these facts, it is clear that the Secretary's decision was based on an issue of which Coleman had no notice and which was not considered at the hearing. As a result, no evidence on this issue was introduced at the hearing by Coleman or the Government, and, in fact, the Government counsel went out of his way to elicit from the Government's chief witness the extent of Coleman's sales during the first ten months of 1957 which was clearly not relevant to the issue on which the Secretary based his decision in this case [A. 107].

Although the Secretary's decision is improperly grounded on issues not tried at the hearing and of which Coleman had no notice or opportunity to defend, nevertheless, the evidence, incomplete as it is, does not support the Secretary's decision that the building stone on the Coleman claims was a "common variety" as that term is used in Section 3 of the Act of July 23, 1955. The Deputy Solicitor, who wrote the Secretary's decision, concluded: "In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety' within the meaning of the Act." [A. 11]. The court of appeals correctly answered this view by stating that: "The Department's 'quantity equals common variety' formula is not consistent with

either the letter or the spirit of the 1955 statute. * * *" [A. 58]. Moreover, from evidence elicited at the hearing on other issues, it is clear that all the building stone in the area was not identical stone. Coleman testified that he had a wide variety of deposits as shown by photographs he had at the hearing and of several classifications of quartzite all having a use and value [A. 137]. The difference in the deposits of quartzite, Coleman explained, was one reason why he considered it necessary to locate eighteen claims. [A. 171, 173]. Even the Government witnesses admitted that the building stone in these claims ranged in colors from gray, buff, reds, pinks and rusty colored which grade into black [A. 103] and that it, for many years, had been used for fireplaces, rock walls, and, to a limited extent, for veneer-type construction [A. 106]. Another Government witness characterized the Coleman building stone as very good material [A. 129] which can be cut and shaped with no more waste than any other fieldstone [A. 128].

The Solicitor of the Interior, acting for the Secretary, has endeavored by decision to hold all stone to be a common variety under Section 3 of the Act of July 23, 1955. This construction is in accord with the Interior Department's expressed policy on changes that should be made in the law by Congress.[9] The Interior Department obtains this result by holding that the words

[9]"The Department of the Interior has taken the position that the distinction between common and uncommon varieties of sand, stone, gravel, pumice, pumicite and cinders ought to be eliminated altogether, and that all varieties should cease to be available under the general mining laws, but only under the Materials Act." Frank J. Barry, Jr., Solicitor, Department of the Interior, "Determination of What Constitutes 'Common Varieties' ", 12th Rocky Mountain Mineral Law Institute, 225 at 239.

"common varieties of * * * stone" in the law do not mean common varieties of stone but common varieties of a particular type of stone such as limestone. Following this reasoning, the Solictor of the Interior has found limestone suitable for use in the production of cement to be a common variety,[10] although the Senate Committee Report reporting favorably Section 3 of the Act of July 23, 1955, expressly stated that the "distinct and special" properties of limestone suitable for use in the production of cement would prevent it from being a common variety.[11]

In the Secretary's decision in Coleman, the Deputy Solicitor writing the decision followed the reasoning that the words "common varieties of * * * stone" in Section 3 of the Act of July 23, 1955 means not what the section literally says but, rather, what it does not say, *i.e.*, common varieties of a particular mineral—in this case building stone [A. 11]. The court of appeals disagreed with this, pointing out that stone which is chiefly valuable as building stone is, by that fact, not a common variety of stone [A. 58] for the obvious reason that it has some property giving it "distinct and special value" with the meaning of Section 3.

Construing the Materials Disposal Act of July 31, 1947, and the Act of July 23, 1955, which amended

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[10]"Determination of What Constitutes a 'Common Variety' of Limestone used in the Manufacture of Portland Cement" by Solicitor of Department of Interior M-36619 dated May 12, 1961, and M-36619 (Supp.) dated October 5, 1961. See also: Hearings before the Subcommittee on Minerals, Materials, and Fuels of Committee on Interior and Insular Affairs, United States Senate, Eighty-ninth Congress, First Session on Public Law 167, Eighty-fourth Congress, its Interpretation and Administration, pp. 126 and 127.

[11]Senate Committee Report No. 554, Eighty-fourth Congress, First Session, p. 8.

the earlier Act, clearly demonstrates that the Secretary's decision is in error in construing the words "common varieties of * * * stone" in Section 3 of the latter Act to mean "common varieties" of a particular mineral, *i.e.*, building stone. Under the Materials Disposal Act of 1947, "sand, stone, gravel" and other materials were made subject to sale if the disposal of such materials "is not otherwise expressly authorized by law, including the United States mining laws." This qualifying language in the 1947 Act excluded building stone from disposal because building stone was expressly made locatable under the mining laws by 30 U.S.C. 161.[12] When the 1955 Act amended the Materials Disposal Act of 1947, "stone" continued to be listed as one of the materials subject to disposal. No mention is made of building stone.[13] Section 1 of the 1955 Act for the first time limited *stone* and other materials to "common varieties", and, by Section 3, excluded common varieties of stone

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[12]After the enactment of the Act of July 23, 1955, the Department of the Interior has continued to recognize in its regulations that 30 U.S.C. 161 is in full force and effect. See 43 Code of Federal Regulations 3416.7 (January 1, 1967).

[13]The Government at page 28 of its brief concedes Section 3 of the Act of July 23, 1955 (30 U.S.C. 611) did not repeal Section 161 and concludes by stating "Thus 161 remains entirely effective as to the relatively rare and uncommon varieties of building stone which are not covered by Section 611." Such an argument overlooks the fact that the building stone act (30 U.S.C. 161) was not enacted to authorize the location of "rare and uncommon varieties" of building stone such as marble but rather building stone, to be used in buildings and other structures where strong, rough, work is required. Conlin v. Kelley, 12 L.D.1: (1891), which caused Congress in 1892 to enact the building stone act, stated marble and slate were locatable but held not subject to location stone of some value as building stone, "* * * being used for foundations of buildings, cellar walls, bridge abutments and other places where strong, rough, work is required; * * *"

and other minerals from location under the mining laws.[14] In light of this, Congress could not have intended, in amending the 1947 Act by the 1955 Act, to have given the word "stone" in the 1955 amendatory Act a meaning which included "building stone" when the 1947 Act so clearly excluded "building stone" as a possible meaning of the word "stone".

The Government seeks, however, to make the word "stone" in the 1955 Act mean "building stone" from occasional appearances of the phrase "building stone" in the legislative history and would ignore the rest of that history.

First of all, there is no indication that the persons who used that phrase intended to include building stone useful for external surfaces of buildings rather than simply stone useful as an aggregate or fill in building operations.

Second, there is no use of the term "building stone" in the consideration of the legislation by the House, and it was the house bill which was enacted. There is a single reference before the House to "stone" as a "building material" (101 Cong. Rec. 8743 (1955)), and that suggests that Congress did not have building stone in mind but had in mind the much more common stone suitable for aggregate or fill in building operations.

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[14]By Act of August 1, 1955 (69 Stat. 434) Congress repealed the Timber and Stone Act (Act of June 3, 1878, 20 Stat. 89), as amended, which provided for the disposal of lands chiefly valuable for stone—not building stone, because "the Public Sales Act, the Materials Act, and the mining laws now in force and effective have rendered the old Timber and Stone Act, as amended, obsolete." U.S. Code Cong. and Ad. News, Vol. 2, 84th Congress, 1st Session, 1955, p. 2593 at p. 2594.

Furthermore, none of Interior's recommendations to the Congress that appear in the Committee Reports used the term "building stone" or referred to 30 U.S.C. 161. To the extent that weight should be given to administrative construction of the 1955 Act, it would seem proper to stress what Interior told or failed to tell Congress at the time it was being considered. Interior was surely aware of Section 161, and its failure to mention it, and its failure to include building stone, are significant. Moreover, the legislative history contains abundant evidence that Congress aimed to prevent abuses of the mining laws by precluding locations based on certain materials like sand and gravel that were found throughout very wide areas, were of slight intrinsic value and thus were susceptible to widespread abuse, and had often been the subject of misuse by persons who were interested in non-mineral values. Congress surely did not regard as an abuse of the mining laws building stone locations on lands which are chiefly valuable for such building stone.[15]

III.

The Government Improperly Seeks to Support the Secretary's Decision by Seeking to Restrict the Scope of Judicial Review and to Avoid the Standards of Review Set by the Administrative Procedure Act.

By inferring at pages 16 and 17 of the Government brief that this is a collateral attack on the Secretary's decision and that the Court's jurisdiction in the case was confined within "the relatively narrow precincts afforded by an action in the nature of mandamus",

[15]There is no dispute that the lands involved here are chiefly valuable for building stone, and, indeed, have no other value.

the Government seeks to restrict the scope of judicial review and to avoid the standards of review set forth in the Administrative Procedure Act, 5 U.S.C. 706.

These contentions are unsupported by any case decided since the enactment of the Administrative Procedure Act and would constrain the application of the Act in a manner inconsistent with both its terms and its legislative history and in defiance of this Court's admonition that the Act is to be given a "hospitable interpretation." *Shaughnessy v. Pedreiro,* 349 U.S. 48, 51 (1955). Raising the validity of the Secretary's decision by affirmative defense in an answer and in counterclaim, as Coleman did in this case, is authorized by 5 U.S.C. 703. As pointed out by the Court of Appeals, there should be no distinction between an action to review the Secretary's decision and a judicial review of the decision by an affirmative defense in an answer, or by a counterclaim in a suit brought by the United States, as "this should not be a race to the courthouse."[16] We submit that the validity of the Secretary's decision in the administrative proceeding is squarely presented to this Court.

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[16]The Government seems also to feel that some force is added to its argument because this Court has pointed out that the Department of the Interior was "granted plenary authority over the administration of public lands, including mineral lands" (*Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963)) and it acts "as a special tribunal" for the validation or invalidation of claims to the public domain. (*Cameron v. United States,* 252 U.S. 450, 459) However, the language of the Administrative Procedure Act clearly includes the Interior Department and the Bureau of Land Management as "agencies" to which the Act applies, 5 U.S.C. 551; *Adams v. Witmer,* 271 F. 2d 29, 33 (9th Cir. 1958). See also: Senate Document 248, 79th Congress, 2d Sess., Administrative Procedure Act, Legislative History 1944-1946, pp. 13, 196. The provisions of the Administrative Procedure Act dealing with judicial relief apply to all agencies, 5 U.S.C. 701. Moreover, the legislative history permits

The Government seeks to restrict the scope of judicial review on the ground that, on invitation of the Court of Appeals, "the Secretary consented to be joined as a party to this case . . . only pursuant to 28 U.S..C 1361." Brief for Government page 17. The Secretary is without the power to so restrict the scope of judicial review of his decisions.

Prior to the enactment in 1962, of 28 U.S.C. 1361, the district courts outside the District of Columbia had jurisdiction to review agency action. *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94 (1902), *reversing* 102 Fed. 565 (C.C.W.D. Mo., 1900). Prior to this enactment, federal district courts, both in and outside the District of Columbia, had jurisdiction to issue injunctions, *Noble v. Union River Logging R. Co.,* 147 U.S. 165 (1893); *American School of Magnetic Healing v. McAnnulty, supra,* to grant declaratory judgments, 28 U.S.C. 2201, and to issue writs of habeas corpus, 28 U.S.C. 2241. With regard to mandamus, however, the district courts of the District of Columbia had jurisdiction to issue writs of mandamus and other district courts did not. *M'Intire v. Wood,* 11 U.S. (7 Cranch) 504 (1813); *Kendall v. United States,* 37 U.S. (12 Pet.) 524 (1838); Senate Report No. 1992 to H. R. 1960, 87 Cong., 2d Sess. (1962), which became 28 U.S.C. 1361. The enactment

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no doubt that Congress intended the Act to apply equally to all agencies. As the House Report explained:

> "The bill is meant to be operative 'across the board' in accordance with its terms or not at all. * * *" Legislative History at 250.

On the floor of the House, Congressman Sabeth added:

> "The object of the bill is * * * to establish uniformity of practice so that any citizen may have his day in court with a minimum of delay." Legislative History at 345-346.

of 28 U.S.C. 1361 was designed to grant to the district courts outside the District of Columbia the power to grant relief in the nature of mandamus, and thus to correct the then-existing disparity among the courts. By no stretch of the imagination can this enactment be construed as stripping the district courts of their jurisdiction to issue injunctions, declaratory judgments, writs of habeas corpus, or other appropriate relief in connection with their review of administrative decisions. See 5 U.S.C. 703.

In this case, Coleman raised the question of validity of agency action by an affirmative defense in the answer as well as by his counterclaim. Thus, both the answer and counter-claim made the validity of the Secretary's decision an issue because of the provision in 5 U.S.C. 703 which provides that agency action is subject to judicial review in civil proceedings for judicial enforcement. Even if it could successfully be contended that the counterclaim contained a prayer for mandatory relief (issuance of a patent), this was not the relief granted by the Court in reversing the Secretary's decision, nor was the relief granted in the nature of mandamus. The answer, which placed the validity of the Secretary's decision in issue, did not pray for affirmative relief.

The belief expressed by the Secretary in the motion for joinder [A. 75] that he could choose to be joined as a party to the action only pursuant to the provisions of 28 U.S.C. 1361 is erroneous. When he voluntarily became a party, he was a party for all purposes and not only for such purpose as he may choose. *Cf. United States v. Norwegian Barque "Thekla"*, 266 U.S. 328 (1924).

In the final analysis, however, the terms under which the Secretary "consented to be joined" are immaterial, as the validity of agency action may be determined by the Court even though the Secretary is not a party. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944); *Williams v. Fanning*, 332 U.S. 490 (1947). *Cf.* 5 U.S.C. 703 which permits review of agency action even in "criminal proceedings for judicial enforcement." The District Court had jurisdiction of this ejectment action by virtue of 28 U.S.C. 1345 and Coleman, as defendant, had the right to defend and to counterclaim. *United States v. Norwegian Barque "Thekla", supra; Guaranty Trust Co. of New York v. United States*, 304 U.S. 126 (1938); 5 U.S.C. 703.

IV.

The Validity of the Coleman Building Stone Claims Was Proven When Coleman Established That They Were Located on Land Chiefly Valuable for Building Stone; In Addition He Also Met the Prudent Man Test and Even Interior's Erroneous Creation—Present Marketability at a Profit.

At the outset we will show by both the prudent man test and the Interior's creation—present marketability at a profit—are inapplicable to building stone placer claims located on lands chiefly valuable for building stone. Then we will show that Coleman met the prudent man test which is applicable to other mineral deposits and even met the present marketability test which the Interior Department has erroneously established for minerals of common occurrence and now seeks to extend to all mineral deposits. In this connection we will show that present marketability at a profit test is

not simply a refinement of the prudent man test as the Government now urges.

The Land Office held in *Conlin v. Kelly,* 12 L.D. 1 (1891), that building stone was not a mineral and, therefore, not subject to entry as a placer under the mining laws. Congress promptly enacted Section 1 of the Act of 1892 (30 U.S.C. 161), and provided that "lands that are chiefly valuable for building stone" are open to entry and location with placer mining claims under the mining laws.[17]

Congress did two things by Section 1 of the 1892 Act. First, it designated building stone as a locatable mineral, and second, instead of using "valuable mineral deposit" which is the definition of discovery set forth in the mining laws (30 U.S.C. 22), this 1892 Act made "lands that are chiefly valuable for building stone" the test for discovery. Inasmuch as the evidence is uncontradicted that the Coleman placer mining claims are located on lands "chiefly valuable for building stone" and Coleman has operated a quarry on these claims since 1949, Coleman fully met the discovery requirement called for by the building stone act and is entitled to a mineral patent to his mining claims.

The Secretary held that Coleman "was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23, 1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit." [A. 12]: Implicit in this holding is the application of present marketability at a profit as the test of

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[17]Section 2 of the Act of August 4, 1892 amended the Timber and Stone Act of June 3, 1878 by extending its provisions to all public land states.

discovery for this mineral deposit. In the Government brief, for the first time the argument is made that the prudent man test announced in *Castle v. Womble,* 19 L.D. 455 (1894) is not essentially different than Interior's present marketability at a profit test and that the latter test is simply a refinement of the prudent man test. The clash in these two tests in clear upon a reading of the prudent man test in *Castle v. Womble, supra,* which is as follows:

> "After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States * * * are * * * declared to be free and open to exploration and purchase.' For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do."

The prudent man test has been judicially approved. *Chrisman v. Miller,* 197 U.S. 313 (1905); *Cameron*

v. United States, 252 U.S. 450 (1920), and *Best v. Humboldt Mining Co.,* 371 U.S. 334 (1963).

The Government states that present marketability at a profit test is a statutory interpretation of the mining laws "to which the Government has adhered to for five decades", and the court of appeals "declined to show the 'great deference to the interpretation given the statute by the officers or agency charged with its administration' that this Court thought appropriate" in *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

The Government's reliance upon *Udall v. Tallman, supra,* is misplaced. There the question was the interpretation of an administrative order, not the mining laws or any other statute, and the Supreme Court noted that the judiciary should defer more to agency construction of administrative orders than to agency construction of a statute, even contemporaneous with its enactment Id. at 16. This is not, moreover, an agency construction contemporaneous with the statute: The Interior's claimed precedent dates from 1929, while the mining laws date from 1872. *Tallman* was a case where several private parties had made very substantial expenditures in reliance upon the interpretation of the agency which the Court upheld, and a contrary result would have worked a great hardship. The converse is true here, for in this case the Government would oust from the lands involved the only private person interested in them, and upon which he has labored since 1949 to develop them.

Moreover, deference can not be given to a statutory interpretation which is constantly changing. The marketability rule contended for and set forth in the Government brief is not a statutory interpretation "to which

the Government has adhered to for at least five decades". The decisions cited by the Government at page 15 of its brief to show adherence to marketability as a statutory interpretation of the words "a valuable mineral deposit" (30 U.S.C. 22) do not support the Government's contention. These and other decisions show a statutory interpretation which has been changing through the years, the most recent change being a revision of the marketability rule announced for the first time in the Government brief.[18]

Moreover, the claim made in the Government brief that the prudent man test calls for a present profitable market for a mineral deposit before there can be a mineral discovery is a view completely inconsistent with the traditional test for mineral discovery announced in *Castle v. Womble, supra.*

The only building stone case cited by the Government on page 15 of its brief is *Stanislaus Electric Power Co.,* 41 I.D. 655 (1912). This decision construed

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[18]These changes have occasioned comment from officials of the Department of Interior. See: 10th Annual Rocky Mountain Mineral Law Institute (1955) where H. R. Hochmuth, then Associate Director of the Bureau of Land Management said at page 473:

> "There can be no gainsaying that the Mining Law of 1872 is not administered as it was originally written and intended. There has been a definite trend in decisions toward more stringent requirements to establish the validity of a claim. * * *"

And, at page 489, where he stated:

> "The conclusion seems inescapable that the days of the 1872 mining law are numbered. Until such time as it is replaced or drastically revised, it will be administered with ever-increasing rigidity. * * *
>
> "The result is that what we are administering today is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making. * * *"

the building stone act (now 30 U.S.C. 161) and held a placer mining claim invalid because the land was chiefly valuable as a power site and not for the building stone, and the owner of the mining claim, a power company, intended to use the claim for a power site. All the other cases cited by the Government involve sand and gravel except *United States v. Barngrover,* 57 I.D. 533 (1942), which involved silt and clay.

The 1929 and 1933 decisions cited by the Government did not purport to establish the marketability rule but had a single common purpose which was to establish that certain substances (sand and gravel) were minerals within the mining laws, as we have seen Congress did for building stone by the Act of August 4, 1892. For example, *Layman v. Ellis,* 52 I.D. 714 (1929), overruled *Zimmerman v. Brunsen,* 39 L.D. 310 (1910), and held that gravel deposits, conceded to be valuable, were minerals locatable under the mining laws. *Taking of Sand and Gravel from Public Lands for Federal Aid Highway,* 54 I.D. 294 (1933), affirmed *Layman v. Ellis, supra,* and, for the first time, mentioned the marketability factors and bona fides in development when the argument was made that to call such commonplace substances minerals would permit the acquisition of areas containing sand and gravel for other purposes than mining. *United States v. Barngrover, supra,* involved a determination whether silt and clay are minerals and *Layman v. Ellis, supra,* is cited as authority.

Present marketability at a profit as a test for discovery, limited to minerals of common occurrence, appears however, in *United States v. Foster,* 65 I.D. 1 (1958), involving sand and gravel. The only decision

cited at page 15 of the Government brief, which mentions the prudent man test or *Castle v. Womble, supra,* is *Foster v. Seaton,* 271 F. 2d 836 (C.A.D.C. 1959), which affirmed *United States v. Foster, supra.* This judicial decision quotes a part of the prudent man test set forth in *Castle v. Womble, supra,* and then says:

> "With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the *additional requirement* of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire lands for purposes other than mining." (Emphasis added.)

In the following year, the Secretary handed down a decision in *United States v. Heirs of John D. Stack,* #28157, decided March 28, 1960, which involved sand and gravel deposits on placer claims. In holding the claims invalid the Secretary said:

> "There are two tests to determine whether a discovery has been made. The particular test to be applied depends upon the character of the minerals involved. Where the minerals are of limited occurrence, and in and of themselves have intrinsic value, such as gold, the 'prudent man' test set forth in Castle v. Womble, 19 L.D. 455, 475 [457] (1894), is applied. * * * However, with respect to minerals of widespread occurrence, such as sand and gravel, it is necessary to show *additionally* that the deposit can be extracted, removed, and marketed at a profit. * * *" (Emphasis added)

Apparently the Solicitor of the Interior began to be concerned about the soundness of a rule which, com-

mencing in *Layman v. Ellis, supra,* established gravel as a mineral and, by administrative interpretation, had become an additional test of discovery applicable only to minerals such as sand and gravel. At any rate, in 1962 the Solicitor of the Interior handed down his opinion called, "Marketability Rule", 69 I.D. 145 (1962), in which, for the first time, he said:

> "The marketability rule about which you have particularly asked our views is merely one aspect of this [prudent man] test. * * * This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied only to nonmetallic minerals of wide occurrence. * * *" (words in brackets added).

No authorities were cited for this proposition and, of course, none could be, because this decision is the first time that even the Interior had advanced the idea that all minerals must meet the test of present marketability.[19] *Julius R. Gugliemetti,* A-27871 (May 13, 1959), and *United States v. New Jersey Zinc Co.,* 74 I.D. 191 (1967), cited at page 19 of the Government brief, are both based on the finding of the Secretary that the prudent man test was not met. The latter case,

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[19]In 1965 H. R. Hochmuth, then Associate Director of the Bureau of Land Management of the Department of the Interior, predicted in time that the marketability test would supersede the prudent man test. In 10th Annual Rocky Mountain Mineral Law Institute (1965) he stated at 478:

> "I have described the increasingly conservative concept of the prudent man and the marketability test being applied to nonmetallics. A prediction may be made: The time seems to be approaching when the prudent man theory, as it is now known, will be eliminated and the marketability rule will be extended to include all locatable minerals. This prediction is based on the increasing concern for economic value as evidence in several of the more recent cases."

which was decided after the "Marketability Rule" opinion in 1962, does not mention it, and, at page 194, the Government denied the charge that it was applying a rule which would require present profitability of the operation and claimed "that the character of evidence in this case is such that a prudent man would not be justified in the further expenditure of labor and means, with a reasonable prospect of success."

The foregoing recital shows changes in the interpretation of the rule now known as present marketability at a profit. The most recent change in the rule is the policy first announced by the Government in this case —that the prudent man test and profitable marketability are not essentially distinct standards, but, rather, the marketability test is a refinement of the prudent man test. Moreover, the Government makes it clear that present profitable marketability is intended because the Government says, without citation of authority (except a case involving inventions, which, of course, is not pertinent), "it seems altogether implausible that Congress intended to facilitate the stockpiling of the public domain by investors hopeful that some future event—the development of a new use for the mineral causing a rise in prices or the development of new processing techniques lowering production costs — would render a currently valueless mineral deposit marketable." What the Government is saying is that mining claims are invalid and the locators may be evicted as trespassers where prospective values of a mineral deposit incapable of being marketed at a profit under existing mining methods, processing techniques, and existing market conditions, but which represent substantial reserves dependent upon reasonably contem-

plated improvements or changes in mining or treatment methods and reasonably contemplated future market and economic conditions. This is entirely contrary to the spirit and intent of the mining law and the provisions of the prudent man test set forth in *Castle v. Womble, supra.*

Many successful mines in the West would never have been developed had the mining laws in the past been interpreted as the Government now proposes. One example is the development of the Bingham, Utah low-grade ore deposit by Daniel C. Jackling into the largest copper mine in the United States.[20] Another example which could not qualify as a discovery under the policy of the Government first announced in its brief, are uranium discoveries made for several years after November 24, 1958. The United States Government announced on that date that it would not give a market in its purchase program which ended December 31, 1966, for uranium concentrates mined from discoveries made after that date.[21] Yet today because of projected future demand for uranium concentrates, uranium is a prime target for exploration. These two examples illustrate that the prudent man test and present market-

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[20]See: The Porphyry Coppers (1933), by A. B. Parsons, pp. 45-96: The Porphyry Coppers in 1956 (1957), by A. B. Parsons, pp. 27-48 and The Richest Hole on Earth—The History of the Bingham Copper Mine, Monograph Series, Utah State University, Vol. II, No. 1 (1963) at p. 8, "The Bingham Mine has particular significance in the history of mining, not only because of its colossal size, but because it was here that the opencut mining of copper was first introduced and perfected. As the mountain of "worthless" low-grade ore was transformed into the world's largest opencut mine, the traditional hand-drilling and hand-picking of highly-selected first-class ores gave way to mass production, utilizing mechancial methods of handling large volumes of ores and overburden."

[21]Twenty-fifth Semiannual Report of the Atomic Energy Commission, at pp. 8 and 9 (January, 1959).

ability at a profit are not essentially the same and that present marketability at a profit is not "simply a refinement" of the prudent man test.

Moreover, if you assume that the locator of a building stone placer must show not only that the land is "chiefly valuable for building stone", but, additionally, must show the deposit is a valuable deposit by the prudent man test, the evidence in this case fully meets not only the prudent man test but also the Interior-imposed test—present marketability at a profit.

There was no evidence introduced at the hearing concerning a market specifically directed at July 23, 1955, since it was not an issue at the hearing, although it is clear from the sales that from 1949 down to the hearing in 1958, Coleman had continuously operated the business of quarrying and selling building stone.

Although the evidence is incomplete as to the volume of sales or total amount of sales, it does disclose that he had filled twenty sales books and that he determined his prices on the basis of his out-of-pocket costs. It thus appears that he made a living producing and selling this stone. Coleman stated he had never advertised his building stone and expressed confidence that a larger market for it could be developed [A. 132]. One witness for the Government mentioned that the demand for such stone went in cycles [A. 129]. Clearly, the Secretary's decision gave no consideration to any prospective market for this building stone which might reasonably develop by advertising and sales efforts or that future trends in home construction will reasonably be expected to result in increased demand for the building stone. Assuming more is required than showing land is chiefly valuable for

building stone, a basic error in the Secretary's decision, as noted by the court of appeals, was his conversion of one aspect of relevant evidence (present marketability) into an absolute legal requirement with respect to building stone in derogation of a time-honored, judicially approved test of "value" applicable to locatable minerals.

In this case, the Hearing Examiner, who had the advantage of being able to observe the witnesses, and the Director of the Bureau of Land Management, both found that Coleman had a valuable deposit of building stone on some of the Coleman claims and was entitled to a mineral patent to these claims. Both found that Coleman had established a market for his building stone [A. 190 and 260]. Yet the Secretary found that there was not a valuable deposit of building stone on any of the Coleman claims even though the Forest Service did not dispute Coleman's evidence that they are chiefly valuable for building stone and the Government's chief witness testified that the stone had long been used as building stone.[22]

The Government recognizes the *inconsistency* of its position in arguing the land is not valuable for building stone after conceding that it is chiefly valuable for building stone, and attempts to cure this inconsistency by intimating that perhaps the land did have other values. For example, in a footnote on pages 25 and 26 of the Government brief, the statement is made that evidence the land has value for other uses might be diffi-

[22]Contrast the consideration being given by the Forest Service that material on the claims might be sold under the Material Disposal Act [A. 139] with the Secretary's conclusion, supported by the Government in this Court, that as a matter of law Coleman could not find it "prudent" to contemplate the same thing.

cult to develop where uses such as "recreation, wild life, conservation and watershed protection" cannot readily be measured in dollars. But the Forest Service acknowledged that the land covered by the Coleman mining claims had no value for these uses. See footnote 7 *supra*. Again, at page 21 of the Government brief, to discredit Coleman's good faith (which never was an issue), the statement is made that Coleman spent "thousands of dollars and hours" building "a home on 720 acres in a highly scenic national forest." This statement is completely without foundation in the evidence. There is simply no evidence that the Coleman claims and the area around these claims was "highly scenic", and the chief Government witness appraised the house at $1,800.00 [R. 109].

Conclusion.

It is respectfully suggested that the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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